not making the garnishee order absolute. My reasons are as follows.

First, s 219(2) of the Companies Act 1965 clearly provides that in the case of a winding up by the court, as opposed to voluntary winding up under sub-s (1), the winding-up date shall be deemed to have commenced from the presentation of the petition. Secondly, the fact of a winding-up order is to avoid all disposition of the property (including things in action) of the company made between the commencement of the winding up, ie the presentation of the petition and the winding-up order. Therefore, s 224 clearly provides that any attachment or execution against the property of the company after the commencement of the winding up is void. Hence, in the present case, as the winding-up petition against the first defendant had commenced well before the garnishee proceeding was taken in November 1988, the garnishee order made ex parte dated 22 November 1988 is therefore void. Further, there is no basis for me to exercise my powers under s 298(1)(c) Companies Act 1965.

Thirdly, the second defendant was never indebted to the first defendant and as such O 49 r 1 does not apply here. My decision on 9 January 1989 (encl 39)[1] is settled on this issue.

For the above reasons, this appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Yeap Chye Choon & Co; Zain & Co.*

Reported by *Kevin Mathews*

Public Prosecutor v Tan Huang Hiang

HIGH COURT (IPOH) — PERAK CRIMINAL TRIAL NO 7 OF 1984
PEH SWEE CHIN J
6 SEPTEMBER 1989

Criminal Law — Dangerous drugs — Trafficking in — Presumptions — Circumstantial evidence — Whether inconsistent with any hypothesis other than that of guilt — Dangerous Drugs Act 1952, ss 37(b), (d) & 39B

Criminal Procedure — Statements — Recording of statement or words of accused during arrest or interrogation — Whether obligation to record such statement or words mandatory or directory — Circumstances of case — Criminal Procedure Code (FMS Cap 6), s 112

Evidence — Circumstantial evidence — Whether inconsistent with any hypothesis other than that of guilt — Primary evidence not tendered before court — Whether secondary evidence admissible — Evidence Act 1950, ss 27, 61, 62, 63, 64, 65 & 66

The accused was charged with trafficking in dangerous drugs in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952. On the day of the arrest, the accused was initially arrested for another offence which he was not charged for at some distance away from the place of the offence for which he was charged. The accused was searched and two bunches of keys were found. The prosecution's evidence was that the accused said that the keys were to his house and a shoe factory at no 1422 Buntong, and that he kept some dadah (drugs) and could bring him there ('the crucial words'). The inspector then lodged a report after discovery of the exhibits but failed to mention the words from the accused about keeping the dadah in the house. Further, he did not mention the bunches of keys recovered from the accused in his report. Neither did he jot down in his diary what the accused said until the next day. Under cross-examination, the inspector was shown by the defence that he was in breach of s 112 of the Criminal Procedure Code ('CPC') but he denied that he was interrogating the accused under that section. Further, he denied having severely assaulted the accused.

Held, acquitting the accused:

(1) Except for the crucial words, the prosecution's evidence against the accused was entirely circumstantial. The court had to bear in mind that such circumstantial evidence, to be sufficient to sustain a conviction, must be inconsistent with any other hypothesis other than that of the guilt of the accused.

(2) It was more probable than not that two other persons had each a complete set of keys to the factory premises. Further, the landlady was living at the back portion which was not sealed off from the front portion where the factory was. On such evidence, it would be quite impossible to say that it must be the accused who had hidden the drugs in the room in that house, except for the crucial words.

(3) There was not the slightest doubt that the statement of the accused while under interrogation was not reduced into writing. Section 112(i) of the CPC applies equally to both accused persons and witnesses as the reading of the proviso to sub-s (ii) made it more applicable to accused persons than witnesses.

(4) The failure to reduce into writing those crucial words would not render them inadmissible. The court considered the reality of urgency of the situation. Further, the provisions of

s 112(ii) and (iii) would have to be communicated and explained to the accused as required by s 112(iv) which itself would involve somewhat time-consuming explanation. Such circumstances made the court conclude that the provision would be directory rather than mandatory. Even if it was a mandatory provision, those crucial words were evidence, though illegally obtained, which was nonetheless very relevant to the matters in issue and would be therefore admissible.

(5) Since the phrase 'shall be reduced into writing' would have to be read as 'may be reduced into writing', those words would import a discretion for the interrogator and such discretion would have to be exercised reasonably and fairly.

(6) The oral evidence given by ASP Yeow was undoubtedly secondary evidence of a private document. The best evidence rule would be that the primary evidence should be produced. However, it was apparent that the prosecutor would not be producing it and no one could compel the prosecution to do so. The evidence, however, would be justified and admissible by s 65(1)(a)(i) of the Evidence Act 1950 which applies to civil and criminal cases.

(7) It was most probable that the police could not pin-point any particular person living in or connected with the shoe factory as the culprit and that the accused, being a partner, was brought to book and charged. Therefore, it was more probable than not that the accused did not utter those crucial words, that he did not point out the boxes where one contained the drugs and that he did not know it was there.

Cases referred to
1 *Sum Kum Seng* v *PP* [1981] 1 MLJ 244 (folld)
2 *Chong Soon Koy* v *PP* [1977] 2 MLJ 78 (folld)
3 *Kuruma* v *R* [1955] 1 All ER 236 (folld)
4 *Ma Mi* v *Kallander* AIR 1927 PC 15 (refd)

Legislation referred to
Criminal Procedure Code s 112
Dangerous Drugs Act 1952 ss 37(b), (d), 39B
Evidence Act 1950 ss 27, 61, 62, 63, 64, 65, 66

Zainal Abidin bin Kamarudin for the Public Prosecutor.
Dato' Paramjit Singh Gill for the accused.

Cur Adv Vult

Peh Swee Chin J: The charge against the accused was as follows:

> That you, on 13 January 1984 at about 2.15pm at premises no 1422, Kampong Baru, Buntong, Ipoh, in the district of Kinta, in the state of Perak, on your own behalf, did traffic in dangerous drugs, to wit, heroin weighing approximately 241g in contravention of s 39B(1)(a) of the Dangerous Drugs Act 30 of 1952 (Laws of Malaysia Act 234) and that you have thereby committed an offence punishable under s 39B(2) of the same Act.

The accused claimed to be tried and at the end of the case for the defence, he was acquitted and discharged. I set out the evidence briefly. On 13 January 1984 at about 1.30pm, the accused, curiously enough, was arrested for another offence, ie not being the offence with which he was charged. He was arrested at Jalan Sultan Yussuf, Ipoh, quite a distance away from the house mentioned in the charge, in another part of the city.

The accused was searched, and Insp Sakri (PW4), who questioned him, found two bunches of keys, one containing nine keys and the other, seven keys.

At about this juncture, to forestall any ruling of the court on inadmissibility of ensuing evidence, the learned deputy who was prosecuting before me, informed the court that he would be leading evidence leading to the discovery of the drug, the possession of which formed the subject matter of the offence. I further set out such evidence under s 27 of the Evidence Act 1950, and for convenience s 27 is set out below:

> (1) When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

The accused told him that that bunch of keys (ie the one with nine keys) belonged to house no 1422, Buntong, Ipoh. Insp Sakri then, with the accused and a police party comprising himself, DPC Lim and two others went to the said house at Buntong. Insp Sakri used the same bunch of keys to open the gate and wooden door of the house. He said the accused had shown him the respective keys for the locks he unlocked. The second room in that house was locked with a padlock and Insp Sakri unlocked it with one of the keys. Into this room they went, Insp Sakri said that the accused then pointed to the corner of the room where there were boxes. From one of the boxes covered with a piece of red cloth and sponge, the incriminating exhibits, ie the drug, weighing scale etc were found. The court found the substance found to be the drug as in the charge, after hearing the evidence of the chemist.

Insp Sakri continued his evidence and said that the accused had told him that he (the accused) had kept dadah in the said house. The words used were: 'these keys are meant for my house in Leech Street, and a shoe factory at 1422, Buntong. I keep some dadah and I can bring you there.'

The evidence under s 27 sparked off vehement objections from learned defence counsel and long submissions from both counsel. At the end of them all, feeling inevitably bound by the decisions of *Sum Kum Seng* v *PP*,[1] (where the words were that the accused 'admitted burying the weapons and offered to show me the place'); and *Chong Soon Koy* v *PP*,[2] (where the police officer said he received 'information with regard to a firearm and some ammunition which he (the accused) had hidden in the Berapit Hills in Bukit Mertajam'), I ruled that the relevant words in this case were admissible, with the court having no option to decide otherwise.

Insp Sakri then said he had lodged a police report after the discovery of the exhibits. He agreed, however, that he did not mention at all in the report about the

important words from the accused about the accused keeping the dadah in the house. He said he left them out (and not that he forgot what was said). He said to the effect that the uttering of the words was a very important fact but it was in the statement to the investigating officer (IO).

Insp Sakri also agreed that he did not mention the bunches of keys recovered from the accused in his report though he agreed that the finding of the two bunches of keys was a very important fact. Insp Sakri further said that he did not jot down in his diary about what the accused said on the same day but he did it the next day, 24 hours afterwards. The learned deputy objected to the production of the diary but learned defence counsel said he was not asking at that stage for its production.

Another prominent feature of the cross-examination of Insp Sakri was that he had breached s 112 of the Criminal Procedure Code (FMS Cap 6) ('CPC') which is reproduced below:

> (i) A police officer making a police investigation under this Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined.
> (ii) Such person shall be bound to answer all questions relating to such case put to him by such officer:
> Provided that such person may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge or penalty or forfeiture.
> (iii) A person making a statement under this section shall be legally bound to state the truth, whether or not such statement is made wholly or partly in answer to questions.
> (iv) A police officer examining a person under sub-section (i) shall first inform that person of the provisions of subsections (ii) and (iii).
> (v) A statement made by any person under this section whether or not a caution has been administered to him under section 113(l) shall, whenever possible, be taken down in writing and signed by the person making it or affixed with his thumb print as the case may be, after it has been read to him in the language in which he made it and after he has been given an opportunity to make any corrections he may wish.

The gravity from counsel's point of view was that Insp Sakri had failed to reduce those crucial words into writing according to the said s 112. Insp Sakri said he was not interrogating the accused under s 112 with which he said he was familiar. Insp Sakri denied having, with others, severely assaulted the accused. He said to the effect that the accused might have felt he had done wrong and that was why he had taken them to the house in Buntong. Insp Sakri said that when they went to the Buntong house, there was nobody there.

From the evidence of the IO (or rather the senior officer in charge of the investigation), ASP Yeow said, inter alia, that he instructed one Insp Lee to record a cautioned statement from the accused in which the accused had alleged that he was innocent and that one Ah Loke had a key to the said room and it was most probably Ah Loke who had kept the drugs in the said room of the said house because 'Ah Loke' was a gambler and that the drugs did not belong to the accused. The evidence was extracted from ASP Yeow by learned defence counsel from the contents of the cautioned statement which ASP Yeow had read. The cautioned statement was kept by its recording officer, one Insp Lee. This provoked another round of objection, this time from the learned deputy prosecutor and submissions of both counsel. It should be noted that the prosecution did not apparently want to have adduced in evidence the cautioned statement which was apparently in the possession and under the control of the learned deputy prosecutor.

After having read the cautioned statement of the accused, I ruled that the oral evidence about Ah Loke of ASP Yeow from his memory was admissible. I will comment on it later.

ASP Yeow was shown a certified true copy of form B of the registration of business in respect of the business of the accused. He said he had not seen it before, though he had the certificate of registration of business of the accused at the Buntong house. (Form B showed the accused having a business partner by the name of Chin Pow Loke, but the certificate of registration of business of the accused produced by ASP Yeow merely showed the name of the business and the fact of its due registration.) ASP Yeow said he was unaware of the Form B. He could not trace the said Ah Loke whom the accused mentioned in the cautioned statement. Insp Sakri's evidence was supported by the evidence of DPC Lim who had accompanied Insp Sakri to the Buntong shoe factory.

Liew Kong Ming (PW7) had testified that he was an employee of the shoe factory, ie house no 1422, Buntong, Ipoh at the material time, and that his employers were the accused and the said Chin Pow Loke whom he had met in the factory. He had deposed that both he and his employers had each a complete set of keys and that all the three rooms were opened during working hours and locked after working hours. An application for impeaching his credit was made by the learned deputy prosecutor. PW7 appeared to have admitted making the police statement in question in which nothing about PW7 having a key to the second room in question was mentioned. With reference to this, PW7 replied that the recording officer did not ask him if he also had a key. His statement showed him to have said that he did not know one person Ah Loke. His explanation was that his employer's name was Chin Pow Loke and he did not know if the recording officer had referred to the same person, and that the recording officer did not seek further clarification from him. The court reserved its decision on the application to impeach PW7's credit till the end of the whole case.

Liew Seng Leng (PW8), another employee of the shoe factory at Buntong, said she had heard of one Ah Loke and that he was a partner of the accused by the name of Chen Poh Lok. An application to impeach was made, again by the learned deputy prosecutor and PW8 denied having made the statement to the police in question. PW1 (the recording officer) was recalled and the statement of PW8 was proved to have been made in which she appeared to have said she did not go to the factory of the accused to work.

PW8 said she did not work in the Buntong factory, but made 'shoe-tops' in her house and the accused had come to her house to collect them. She said further that if she was asked about Chin Pow Loke, she would have told PW1 all about him. The court also reserved its decision on the application to impeach PW8's credit.

PW9, another employee at the shoe factory in Buntong said three persons had keys to the three rooms, viz PW7, the accused, and a partner of the accused by the name of Tan Poh Lok ('Tan' being an anglicization according to Hokkien pronounciation of the same Chinese surname of 'Chin'). An application to impeach was again made and the court, after reading the underlined sentences or passages, declined to allow the application to proceed further as no real or material discrepancy was found.

Chian Thiap (PW6), the landlady of the shoe factory premises in question, had also given evidence. She occupied the back portion of the said premises at all material times and the front portion of the same premises was rented out to the accused, with the tenancy therefore negotiated for the accused by the sister of the accused. She was always in the back portion and she could see the workers and the accused with whom she was not familiar. Two sets of the keys were given to the accused through the said sister, with each set consisting of two keys meant for the grille and wooden doors. She did not give the accused any padlock. She said she was told by the said sister of the accused (who gave evidence for the defence later) about a man called Ah Loke and that Ah Loke would come to the shoe factory sometimes he walked with a limp. She said she had seen such a man going to the toilet which she shared with others. It was apparent that the shoe factory was not partitioned off or sealed off from the back portion.

At the end of the prosecution's case, I called for the defence of the accused, after hearing lengthy submissions from counsel. I will refer to such submissions later. My reasons for calling for the defence were as follows.

The accused appeared to have control and management of the shoe factory, ie the said Buntong house in question, as he was one of the partners of the partnership business of the shoe factory. The presumption under s 37(b) of the Dangerous Drug Act 1952 (hereafter called 'the Act') arose, and the accused was therefore one of the 'occupiers'. The drug was found in circumstances indicative of its concealment, and since the accused was one of the occupiers, s 37(d) of the Act applied and the accused was therefore presumed to have possession and knowledge of the nature of the drug. The accused should be presumed to have been a trafficker by virtue of the two presumptions against him as stated above and also of the drug (heroin) herein exceeding 15g in weight.

The accused, in his evidence on oath, said he was residing at Leech Street, Ipoh and that he and Chin Pow Loke were partners of the shoe factory at the Buntong house (when the drug was recovered in a room there). There was an earlier partner called Lim Foo Fah who had withdrawn from the partnership. He identified the Form B of the registration of the said business. He maintained a bank account (D39) of which he and the said Chin Pow Loke were signatories. He said two sets of keys were given by the house owner and Chin Pow Loke had a set of keys to the house, including keys to the three padlocks to the three rooms therein. An employee also had a complete set of keys, viz one Liew Kong Ming (PW7) who had been called by the prosecution. Whoever arrived first at the factory, usually it was Liew Kong Ming, would open up the factory premises. He was arrested at Belfield Street (now known as Jalan Sultan Yussuf). He was interrogated for quite some time by three officers and he was slapped in the process. He did not admit anything and the two sets of keys were found on him. He denied having told the police that he kept dadah at the shoe factory premises at Buntong. He had also never pointed out the drug to the police, as his hands were handcuffed at the back, neither was he present in the middle room when the police searched it. He did see some policemen recovering something, which was seen to be handed over to the inspector (Insp Sakri). He said he did not know that the drug was concealed there. He had seen Ah Loke taking a plastic bag into the factory. His sister (who gave corroborative evidence later) had told him that she had seen Ah Loke three days after the arrest of the accused, in the middle room making a thorough search of it upsetting all the boxes therein, and on being asked, told the said sister that he had kept something in a box and it was missing. Before the said Ah Loke left after such a fruitless search, he had handed a set of the factory keys to the said sister, who so told the accused. In cross-examination, the accused agreed that one Lim Foo Fah was a previous partner of the same business, and when Lim withdrew from the partnership, Ah Loke came in. (It is fairly accurate to say that 'Ah' is rarely a part of any real Chinese name, it is equivalent to 'Si' in Bahasa Malaysia, thus Ah Loke would normally mean 'Si Loke'.) The accused further said that Ah Loke was a habitual gambler and before joining him, he was a lorry driver at tin mines. The accused said he himself was responsible 'for outside' canvassing for customers while

Ah Loke was responsible for the factory. He had a set of keys, so did Ah Loke and the said Liew Kong Ming respectively. After interrogating him, the accused said he was asked by the police to take them to the shoe factory. He said he was in the hall when the middle room was searched. He did not know anything about the drug which was recovered there. He denied that Ah Loke was a fictitious person. DW2, an officer of Malayan Bank Bhd gave evidence that the signatories to account no 1250 were the accused and one Chin Pow Loke. The said Form B (D32) of the registration of business was shown and he said the names and identity card numbers in the said Form B tallied with those in his records. He said he did see the said Chin Pow Loke, but only once.

The said sister of the accused (DW3 — Tan Ah Looi) gave evidence in support of the evidence of the accused on all material details. She said she was a hawker selling food at LLN though she canvassed business for the accused. She told of the encounter as described earlier with the said Ah Loke in the shoe factory who gave her a set of the factory keys which she handed to learned counsel for the accused and she identified them when the keys were shown from counsel's custody.

Learned counsel for the defence again in his final and lengthy submission laid emphasis on his client's election to give evidence on oath and that his evidence was, despite extensive cross-examination, unshaken. He further submitted that the accused did not alone have a complete set of keys (including the key to the middle room), but that two other persons had, viz PW7 (Liew Kong Ming), a factory employee, and Chin Pow Loke. This fact was also corroborated by other prosecution witnesses. This evidence was not seriously challenged by the prosecution.

He also submitted further that the accused was not residing at the Buntong shoe factory but was at a house in Leech Street, to which there was another bunch of keys recovered from the accused. It was submitted further that Chin Pow Loke was not a fictitious person but a real person as seen from the Form B of the registration of business, the evidence of the bank officer, PW7 (Liew Kong King), PW8 (Liew Seng Keng) and PW9 (Lee Foo Yin).

Learned counsel again stressed on the fact that for half an hour both Insp Sakri and DPC Lim had interrogated the accused at their office, yet nothing was reduced into writing contrary to s 112 of the CPC; the evidence led under s 27 of the Evidence Act 1950 should therefore be tested against such failure which as submitted by learned counsel, was to comply with a mandatory provision of the CPC, as s 112 used the words '... shall be reduced into writing ...'.

The evidence led under the said s 27 of the Evidence Act 1950 must be further tested against the failure to have it recorded in the pocket diary. It was submitted that in the *Sum Kum Seng* case,[1] the Federal Court held that it was desirable that the actual words under the said s 27 should be recorded somewhere, and that the accused was facing a very serious charge.

Such evidence under s 27 must be tested also against the failure to have it recorded in the first police report lodged after the recovery of the drug. Because of such failure, it was submitted that there was a serious doubt, and the prosecution's case was a suspicious one and that it would be most unsafe to convict.

I must point out once more, in connection with evidence under s 27, that the accused was alleged to have told Insp Sakri, through the interpretation of DPC Lim, the words: 'I keep some dadah. I can bring you there.' (Hereafter called 'the crucial words'.)

It was further submitted that if the accused had known the dadah to be there, knowing the consequences, he would not have offered to take the police there, and counsel disputed the suggestion of 'remorse' as the cause of uttering those crucial words.

In his reply, the learned deputy prosecutor similarly disputed any allegation of assault by the police on the accused and submitted that Ah Loke was a fictitious person. It was further submitted that the bunch of keys tendered by the defence as having been handed over by Chin Pow Loke to DW3, the sister of the accused, was an afterthought. It was also submitted that if the accused had indeed remained in the hall at that shoe factory, the accused would not have known that the police were turning the room (middle room) upside down. Also, how could the accused hear one officer whisper to another officer?

The court acquitted and discharged the accused and before doing so, the court also held that the credit of PW7 and PW8 was not impeached but that their evidence would be treated with great caution and subjected to close scrutiny.

Except for the crucial words, the prosecution's evidence against the accused was entirely circumstantial. The accused was not found by the police in the middle room, eg in a raid on the house where the drug was found. The court could not help bearing in mind that such circumstantial evidence, to be sufficient to sustain a conviction, must be inconsistent with any other hypothesis other than that of guilt of the accused. The crucial words would be dealt later.

The court concluded that it was more probable than not that Chin Pow Loke, or Ah Loke, was a real person and not a fictitious one. Even such a disinterested person as the bank officer and the landlady had seen him. The court was also of the view that it was more probable than not that two other persons had each a complete set of keys to the factory

premises, apart from the accused. In this connection, the landlady was living at the back portion of the factory not sealed off from the front portion where the factory was. I found it quite impossible to say, on such evidence, that it must be the accused who had hidden the drug found in that room in that house but for the crucial words.

I now deal with the crucial words. In this connection, learned defence counsel at one stage or another submitted with great emphasis that in the interrogation of the accused by Insp Sakri and DPC Lim, the statements of the accused were not reduced into writing, thereby breaching a mandatory provision of s 112 of the CPC, where the word 'shall' was used in reference to statements of accused persons while under interrogation being reduced into writing. There was not the slightest doubt that the statement of the accused while under interrogation was not reduced into writing. Both the learned deputy prosecutor and defence counsel had advanced long arguments on s 112 of the CPC (set out above) and out of deference to them, I think I ought to elaborate on my views on it.

First, I could not accede to the learned deputy prosecutor's submission that s 112 applies to witnesses and not accused persons in regard to statements made by the interrogated to the interrogator being required to be reduced into writing. One must consider also the proviso to sub-s (ii) which would seem to relieve the interrogated from answering any question having a tendency to incriminate himself, and it would thus be more applicable to accused persons rather than witnesses. I ruled therefore that sub-s (i) would apply equally to both accused persons and witnesses.

Secondly, for two reasons at least, I could not accept learned counsel's contention that the breach of sub-s (i), ie the failure to reduce into writing those crucial words of the accused, would render those crucial words inadmissible. In the first place, the court considered the reality of the urgency of the situation of arresting the accused, searching his body, and wanting to know immediately and urgently certain matters, the suspicion about which had caused the accused to be arrested earlier. Further, the provisions of sub-ss (ii) and (iii) would have to be communicated and explained to the accused as required by sub-s (iv) and this itself could involve somewhat time-consuming explanation of the legal requirement. Circumstances like those which could impede such urgent and initial investigation made the court conclude that the provision of having statements reduced into writing would be a directory rather than a mandatory one with the result that the phrase 'shall be reduced into writing' should be taken to mean 'may be reduced into writing'. Another reason was that even if it was a mandatory provision for the sake of academic argument, those crucial words of the accused were evidence, though illegally obtained, which was nonetheless very relevant to the matters in issue in the case, and would be therefore admissible. Please see *Kuruma v R.*[3]

This would not be the end yet of s 112. Since the phrase '...shall be reduced into writing' would have to be read as 'may be reduced into writing', these words would thus import a discretion for the interrogator, and such discretion would have to be exercised reasonably and fairly, in conjunction with which the court recalled the exhortation of the Federal court in *Sum Kum Seng*,[1] that it was desirable that evidence of words of the accused leading to discovery of facts under s 27 ought to be recorded somewhere. Though the crucial words of the accused were allowed to be admitted in evidence, the non-reduction into writing of the words in question was considered unreasonable — and it was a matter which the court did take into consideration in an overall view of the whole case.

There was also some controversy about ASP Yeow's oral evidence on that part of the contents of the cautioned statement recorded from the accused by one Insp Lee on the instruction of ASP Yeow, as related to the mentioning therein of Ah Loke, whom I found is the partner of the accused in the shoe factory. The learned deputy prosecutor submitted that such oral evidence which had emerged during cross-examination was inadmissible. His grounds were that such evidence could only be extracted from the recording officer in whose possession the cautioned statement was; no one could compel the prosecution to produce it. Such evidence coming from ASP Yeow was therefore hearsay and inadmissible. The learned deputy prosecutor submitted further that the contents of a document, as the cautioned statement was, could not be disclosed in evidence without producing the document itself. Learned defence counsel rightly conceded that he could not compel the prosecution to produce it, but he said it would cause an injustice to his client to have such evidence excluded as hearsay. Further, it was submitted that since the document (a cautioned statement) was in the possession of the prosecution, the defence had a right to refer to its contents, and that guidance must be found in the Evidence Act 1950.

The oral evidence in question of ASP Yeow was undoubtedly secondary evidence of a private document, ie the cautioned statement of the accused which was not in his possession but which he had read. The best evidence rule would be that primary evidence, ie the original cautioned statement should have been produced by Insp Lee, its recording officer. However, it was apparent that the prosecution would not be producing it, and as rightly said by the learned deputy prosecutor, no one could compel the prosecution to do so. The best evidence, ie the original cautioned statement, was therefore not forthcoming and it was in the possession of the prosecution, the adverse party to the accused. I set out below for convenience various

relevant sections of the Evidence Act 1950 which would explain my ruling that such oral evidence was admissible.

> 61 The contents of documents may be proved either by primary or by secondary evidence.
>
> 62 Primary evidence means the document itself produced for the inspection of the court.
> Explanation 1 ...
> Explanation 2 ...
>
> 63 Secondary evidence includes —
> (e) oral accounts of the contents of a document given by some person who has himself seen it.
>
> 64 Documents must be proved by primary evidence except in the cases hereinafter mentioned.
>
> 65 (1) Secondary evidence may be given of the existence, condition or contents of a document admissible in evidence in the following cases:
>
> (a) when the original is shown or appears to be in the possession or power —
> (i) of the person against whom the document is sought to be proved;
> ...
> and when after the notice mentioned in section 66 such person does not produce it;
> ...
> (2)(a) In the cases referred to in subsection (1)(a), (c) and (d) any secondary evidence of the contents of the document is admissible.
>
> 66 Secondary evidence of the contents of the documents referred to in section 65(1)(a) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the court considers reasonable under the circumstances of the case:
>
> Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases or in any other case in which the court thinks fit to dispense with it:
>
> ...
>
> (d) when the adverse party or his agent has the original in court;

The relevant evidence of ASP Yeow would thus be justified by s 65(1)(a)(i) read with other sections, and in particular with s 66(d), all set out above. Very few comments, having regard to the express words of the relevant sections, would be necessary except that I would like to observe that all the relevant sections would apply both to criminal and civil cases. The learned deputy prosecutor's submission that it was hearsay would have been upheld only if ASP Yeow had merely heard about the contents of the cautioned statement being read out in his hearing by someone else, please see *Ma Mi* v *Kallander*.[4]

Those crucial words of the accused which practically solved the present case for the police had caused to the court a great deal of hesitation after watching the accused in the box and also after considering all evidence and the submission of both counsel. The court bore in mind the ever present possibility of the accused being an actor of great competence, lying without batting an eyelid, though the accused did impress me as a witness of truth. Despite the exhortation of the Federal Court in *Sum Kum Seng*[1] to have similar words recorded somewhere, the crucial words were not reduced into writing under s 112 of the CPC though their importance could not have failed to impress Insp Sakri, who should have exercised his discretion in recording these words in writing. Again, Insp Sakri failed to mention the words in the first police report lodged by him in connection with this case; neither was it recorded in his pocket diary that day. A thought kept assailing me — most probably that the police could not pin-point any particular person living in or connected with the shoe factory as the culprit responsible, and that the accused being a partner or senior partner, should be brought to book and charged. I therefore concluded that it was more probable than not that the accused did not utter those crucial words leading to the discovery of facts concerning the drug, that he did not point out to Insp Sakri boxes where one of them contained the drug and that he did not know it was there. The accused had therefore rebutted the presumptions raised against him. I therefore acquitted and discharged the accused.

Accused acquitted.

Solicitors: *Paramjit & Co.*

Reported by *Yap Shao Sin*